
CANADA / JUDGMENT

A.E.B. v. S.A.B.

2010 BCSC 1763

COURT

Supreme Court of British Columbia

DECIDED

8 December 2010

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2010 BCSC 1763 A.E.B. v. S.A.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.E.B. v. S.A.B.,

2010 BCSC 1763

Date: 20101208

Docket: E7355

Registry: Chilliwack

Between:

A.E.B.

Claimant

And

S.A.B.

Respondent

Before: The Honourable Mr. Justice Grist

Reasons for Judgment

The Claimant, appearing in person:

A.E.B.

Counsel for the Respondent:

N.J. Harold

Place and Date of Trial/Hearing:

Chilliwack, B.C.

June 21 - 24, 2010

Place and Date of Judgment:

Chilliwack, B.C.

December 8, 2010

- [1] This divorce action raises collateral issues relating to division of family assets.
- [2] The parties began to live together in 1986 and married in February 1994.
- [3] They have three children:
 - (1) A.A.M.B., born December 1994, soon to be sixteen;
 - (2) E.B., born December 1995, soon to be fifteen; and
 - (3) A.A.P.B. born August 1997, now thirteen years of age.
- [4] All three children reside with their mother. Mr. A.E.B. is 47 years of age and Mrs. S.A.B. is 46 years of age. Mr. A.E.B. is an automobile mechanic and Mrs. S.A.B. is a bookkeeper. The parties originally lived in Burnaby, but moved to Chilliwack in September 1997. The matrimonial home is in a rural area on an acre of property. It has an assessed value of \$458,000.00. There is no mortgage on the property.
- [5] Prior to separation, the parties operated an automobile repair business in Chilliwack. They started in 2002, under the company name B Motors, in a building bought and held by a company they jointly owned, H Holding Ltd. In December 2005, Mr. A.E.B. suffered a brain injury which had a marked affect on his ability to continue to do the mechanical work at the automobile repair shop. He was off work for a period of time, following which he tried to go to work, but he was not able to return to his previous level of functioning. The shop was leased out and ultimately sold. When the shop closed, Mrs. S.A.B. obtained part-time work.
- [6] The seizures suffered by Mr. A.E.B. affected his short-term memory and his ability to organize his work. He became a frustrated and angry individual and became difficult to deal with. The parties separated in May 2007, after he physically assaulted Mrs. S.A.B. The RCMP responded to the assault complaint. Mr. A.E.B. became combative and was arrested for assault of a police officer.
- [7] On disposition of the charges, Mr. A.E.B. was placed on a restraining order; however, he continued to place abusive telephone calls to his wife, and often attended at the home in breach of the terms of the order. Mrs. S.A.B. related how it seemed she had become "the enemy". She said that he blamed her for the onset of his seizures and everything that had occurred after.

- [8] Mr. A.E.B.'s access to the children was a continuing problem. He refused to cooperate with access scheduling and made derogatory comments about Mrs. S.A.B. to the children when he saw them.
- [9] After visits with his father, the parties' son, E.B., became verbally abusive of his mother. Following the separation, Mr. A.E.B. lived with his mother in Yarrow, B.C. In the fall of 2008, E.B. refused to return to his mother's residence and lived, for approximately one year, with his father in his grandmother's home.
- [10] Issues arising on the separation came before the Family Court shortly after this and on the first day of October 2007 an interim ex parte order was made granting Mrs. S.A.B. custody and guardianship of the children and providing that the police had the authority to apprehend and return E.B. to his mother. It became apparent, however, that E.B., then nearly 12 years of age, would not voluntarily return to his mother's home and Mrs. S.A.B. decided there would be no point in forcing the issue.
- [11] On February 27, 2008, a further order was made by the Family Court, a consent order requiring Mr. A.E.B. to pay \$331.00 per month to Mrs. S.A.B. for maintenance of the parties' two daughters. Arrears were set at \$6,699.00. Mr. A.E.B.'s Guideline's Income was established at \$40,000.00, based on employment he then held at an automobile speed shop. He provided 12 post-dated cheques when the order was entered but, when these ran out, nothing more was paid and any credits towards maintenance, from this point on, appear to have been sums seized by the British Columbia Family Maintenance Enforcement Program (FMEP). Arrears to June 23, 2010, were in the sum of \$8,116.00. Subsequent arrears to the date of these Reasons would amount to a further \$2,000.00.
- [12] Mr. A.E.B. is also obliged to contribute towards the children's extra s. 7 Guidelines expenses. He has never paid towards these. Both girls are involved in school activities, notably cheerleading competitions. Expenses in relation to this activity have averaged about \$3,000.00 per year.
- [13] E.B. returned to his mother's care in December 2009, after living for a year with his father. His school marks declined markedly during this period and he was expelled for a time in January 2010. Mrs. S.A.B. was able to have him reinstated and his performance has improved. School fees, dental and medical needs for the three children, paid by Mrs. S.A.B. since separation, amount to approximately \$5,000.00. Total s. 7 expenses paid by her are therefore approximately \$17,000.00. Mr. A.E.B. has not had regular employment since December 2008, but has received Employment Insurance (E.I.), and worked intermittently for cash payment. It is my view, that Mr. A.E.B.'s obligation in respect of s.7 expenses would be settled at one-half the total of this sum. Accordingly, this obligation should be assessed at \$8,500.00.

- [14] The automobile repair shop was eventually sold after Mrs. S.A.B. was granted conduct of the sale, and approximately \$227,000.00 is held in trust, after payment of the company 2009 corporate income tax. Other assets include:
- (1) tools and equipment used when the repair shop was in operation;
 - (2) a collection of older automobiles, parts and a trailer, mostly kept at the matrimonial home. Mr. A.E.B., at one time, intended to improve these automobiles and to sell them;
 - (3) the furniture and household contents of the former matrimonial home; and
 - (4) two one-quarter scale racing cars and equipment used by the parties' children before separation.
- [15] The value of the tools and equipment remaining from when B Motors was in operation include two hoists, a brake lath, a compressor and a collection of mechanics tools. Mr. A.E.B. suggested that these goods had a total value of \$15,000.00, which I accept as being a fair evaluation.
- [16] The value of the automobiles, parts and trailer is difficult to set and full realization of their potential value will depend on Mr. A.E.B. putting them into a saleable condition. The parties were not far apart in valuing these assets and the near consensus suggests a value of \$50,000.00.
- [17] The furniture and household contents of the former matrimonial home are, in the most part, dated. The items are functional but not of a marked value. Mr. A.E.B. suggested a value in excess of \$30,000.00. Mrs. S.A.B. disputed this and said this was far more than the cost when they were originally acquired. I accept her evidence in this regard and value these items at \$5,000.00.
- [18] The midget racing cars and equipment are also hard to value. Mr. A.E.B. said that one of the cars cost \$5,000.00 to \$6,000.00. Accordingly, I find the value of these assets to be approximately \$10,000.00.

[19] The total value of family assets is therefore as follows:

Matrimonial home:

\$458,000.00

Trust funds from sale of shop:

\$227,000.00

Automobiles, parts, and trailer:

\$50,000.00

Shop equipment and tools:

\$15,000.00

Furniture and household contents:

\$5,000.00

Midget racing cars and equipment:

\$10,000.00

Total:

\$765,000.00

[20] For shortly over a year after separation, Mr. A.E.B. took the proceeds from the lease of the shop for his own use. He also took \$14,000.00 from the company bank account. Following this, Mrs. S.A.B. removed \$7,000.00, which reduced the account to a nominal balance. The lease payment was \$1,800.00 per month. Mr. A.E.B. has not accounted for the expenses of maintaining the premises and a close account of the net revenue received under the lease is not possible, but the outstanding shop loan was modest and I estimate the net return to be approximately \$1,000.00 per month, for the 12-month period.

[21] He therefore took approximately \$19,000.00 more than Mrs. S.A.B. from the company, during the time after separation and until the shop finally sold.

[22] Mr. A.E.B. raised an issue relating to \$50,000.00 advanced by his parents on acquisition of the shop. He characterized this as a loan. There is no independent evidence of this, no documentation was prepared, and no payments made in the seven years subsequent to purchase of the shop. I don't accept that there is any outstanding loan in this regard.

[23] Mr. A.E.B. has possession of the 1966 Mustang, perhaps the most saleable of the various vehicles. He also wants to retain the Jimmy truck. He has the ability to do what is necessary to return the best value in respect of these assets and the midget racing equipment. He is also best able to deal with the shop equipment and tools and these assets should be transferred to him with credit given for their value. This transfer of automobiles does not include Mrs. A.E.B.'s personal vehicle, which was financed by her mother.

[24] Mrs. S.A.B. needs the furniture and household contents to provide a home for herself and the children, and should retain these, with credit again being given for the value.

[25] To compensate Mrs. S.A.B. for this distribution, \$70,000.00 of the \$227,000.00 of the sale proceeds from the shop should be paid to her. The balance of \$157,000.00 will be subject to an equal division.

[26] The major asset is the former matrimonial home. Mrs. S.A.B. would, if possible, retain the home to continue to provide suitable premises for herself and the children. She claims reapportionment on the basis that the dissolution of the marriage has placed a disproportionate obligation on her through her responsibility to provide for the support of

the children. Mr. A.E.B. is not as employable as he was before the seizure that resulted in his brain injury, but he has maintained employment since. He does not suggest that he is permanently disabled and attributes his present unemployment to the economic downturn affecting the marketability of specialty cars. He presently works on and off, primarily for cash jobs.

- [27] It seems clear that Mr. A.E.B. is not inclined to pay anything for child support. When cross-examined on his failure to contribute, he said that he thought that the children were doing fine, and that he thought it was enough that they were living in a house he jointly owned. Mr. A.E.B.'s disability is a proper limiting factor to be taken into account in assessing the extent of his obligation to pay maintenance, but it also has to be recognized that the limitation in his ability to pay, places a greater burden on Mrs. S.A.B. Further, the obstinate refusal to contribute in accordance with his ability is an aggravating circumstance supporting Mrs. S.A.B.'s s. 65 claim for reapportionment, specifically in relation to s. 65(1)(e), the need to be economically independent and self-sufficient.
- [28] Unfortunately, persons obliged to pay maintenance but who steadfastly refuse to pay are often able to run up extensive arrears and ultimately escape their parental responsibility. Registration with FMEP can help enforcement of outstanding orders, but this agency's powers, in some cases, are limited. This is especially the case where a payor is intentionally underemployed or has non-reported sources of income. Too often the parent having the primary role in the raising of the children of the marriage is frustrated to the point of abandoning all efforts to collect from the defaulting payor.
- [29] The history of this matter indicates that arrears will continue to accrue without any ultimate recovery. Mrs. S.A.B.'s resources are limited. Her income is modest. She presently earns \$32,864.00 per year from her employment. She projects expenses of \$50,000.00. These appear to be reasonable expenses for herself and the three children; however, it is clear that they cannot be met on her income alone. She has had some assistance from her mother, but her mother's resources are not extensive.
- [30] In *Pelli v. Pelli*, [1999] B.C.J. No. 708 (C.A.), both the husband and the wife presented viable claims for reapportionment under s. 65(1)(e). The wife's claim was founded on the financial responsibility she had assumed in supporting the parties' daughter. At para. 13, Esson J.A. said:

13 ... Were it not for the husband's health and employment difficulties, the wife would have a strong claim to an apportionment in her favour. She has for some years discharged the whole of the custodial responsibility and must continue to do so for whatever number of years the child requires support. Furthermore, some weight should be given to her needs to become or remain economically independent and self-sufficient. She earns at a modest level and has little in the way of assets. In many cases, the responsibility of a spouse to provide for the child or children of the marriage is a factor which has supported reapportionment in favour of that spouse, see e.g.:

- Bateman v. Bateman (1984), 42 R.F.L. (2d) 120 (B.C.C.A.)
- Lanaway v. Lanaway (1983), 37 R.F.L. (2d) 214 (B.C.C.A.)
- Kopejtko v. Kopejtko (1985), 49 R.F.L. (2d) 26 (B.C.C.A.)

[31] In *Miller v. Miller*, 2004 BCSC 1283, the custodial parent, the wife, made a claim for reapportionment on the basis that she was primarily respondent for supporting four children of the marriage. The husband was on a disability pension. At para. 22, Hood J. said:

22 It seems to me that Mrs. Miller needs assistance to at least have a chance of becoming economically independent and self sufficient, as well as some security and, in effect, some compensation for her husband's inability to pay child support, which would improve her capacity and her chance of becoming independent. I therefore apportion the net sale price of the matrimonial home on a seventy-five to twenty-five percent basis in favour of Mrs. Miller.

[32] In *Senghera v. Senghera*, 2009 BCSC 899, the custodial parent had two young children dependent on her. The children's father was underemployed and had failed to make court ordered maintenance payments. At paras. 23 and 24, Bernard J. said:

23 I am satisfied that an equal division of the sale proceeds would be manifestly unfair. The bases for reapportionment advanced by the wife are sound. The wife was, for 26 months, solely responsible for preserving and maintaining the former matrimonial home. The financial burden was significant and could only be met by borrowing money from her family and friends. The wife received no financial assistance from the husband in this period. The wife also has a greater need than does the husband to become and remain economically independent. She is the primary caregiver for the parties' young children and the provider of their primary residence. Her employment earnings are compromised by the needs of the children, and will be so affected for many years to come. The husband is in poor financial circumstances; accordingly, his monthly financial contributions to the support of the children are very limited.

24 In all the circumstances and having regard for the cases cited by the plaintiff, I am satisfied that the wife ought to receive 70 percent of the net proceeds from the sale of the home (see *Kopejtko v. Kopejtko*, [1985] B.C.J. No. 1961 (B.C.C.A.) and *Krenzkamp v. Krenzkamp*, [1994] B.C.J. No. 931 (B.C.S.C.)).

[33] *Kopejtko v. Kopejtko* (supra) is an earlier decision of our Court of Appeal, dealing with similar circumstances. In that case, the equity in the matrimonial home was reapportioned on an 80/20 basis in favour of the custodial parent.

[34] These last three cases indicate, in the context of the circumstances of the individual cases, a range of reapportionment based on assumption of the bulk of the cost of supporting the children, to between 70 and 80 percent of the equity in the family assets. Each case needs to be assessed in light of:

- (1) the burden of expected child care expenses falling on the claimant;

- (2) any contributions that can be reasonably expected from the payor spouse;
- (3) the amount of equity available by way of the assets in issue; and
- (4) any competing s. 65 claims presented by the payor spouse.

In order to determine whether reapportionment is appropriate, and if so, what proportionate division is indicated.

- [35] Here, Mrs. S.A.B. has indicated in her Statement of Defence that she would prefer that matters relating to the children be left with the Family Court. The last Family Court order set Guidelines Income for Mr. A.E.B. at \$40,000.00 and maintenance was ordered in the sum of \$331.00 per month for the two children in Mrs. S.A.B.'s care. If maintenance for all three children were provided on the basis of the same Guidelines Income, the monthly maintenance would be \$803.00 per month. At the present level of expense, s. 7 contributions would increase the monthly payment to approximately \$1200.00 per month. Actual payments of maintenance are, however, likely to be partial and infrequent.
- [36] The children are likely to remain dependent for a number of years. E.B. is most likely to follow a trade's training course following high school. The two girls do very well in school and likely would be well qualified to pursue academic post-secondary studies.
- [37] The equity in the family home in this case is greater than the value of the assets in question in the cases cited and moderates the percentage reapportionment appropriate to effect fairness.
- [38] Mr. A.E.B.'s circumstances also prompt consideration of his need to achieve and maintain self-sufficiency. He would like to re-establish himself in his own premises where he could pursue a car repair shop. Even without such a resource, however, he likely is capable of earning an income sufficient to support himself.
- [39] On balance, I am of the view that the appropriate distribution is a 70/30 distribution of the matrimonial home in Mrs. S.A.B.'s favour. In light of the advantage to the children in Mrs. S.A.B. retaining the house, this can be met by a transfer of the home to her in exchange for the sum of \$137,400.00 less \$18,500.00 I have found as a sufficient sum to satisfy present arrears of child maintenance. The resulting sum to be paid on transfer of the home is \$118,900.00.
- [40] Mrs. S.A.B. is entitled to approximately \$148,500.00 from the moneys held in trust from the sale of the repair shop. The payment required to satisfy Mr. A.E.B.'s proportionate share in the matrimonial home should be made from this source.
- [41] Ultimately, Mrs. S.A.B. will receive approximately \$29,000.00 from the funds held in trust. Mr. A.E.B. will receive approximately \$198,000.00. Mrs. S.A.B. will have the matrimonial home transferred to her and retain the furniture and household contents. Mr. A.E.B. will retain the automobiles, parts and trailer, tools and equipment, and the midget racing assets. He will have 90 days from the entry of this order to take possession and remove any of the

items indicated as his property which remain at the matrimonial home. Failing this, Mrs. S.A.B. will be at liberty to dispose of them for whatever she can reasonably realize, paying to Mr. A.E.B. any sums received.

[42] The divorce order will be granted, and I view Mrs. S.A.B. as being substantially successful in the position she put forward in this litigation. She should have her costs on Scale B. The taxed costs should be deducted from the sum payable to Mr. A.E.B. All further claims for relief are dismissed.

"W.G. Grist J."

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